The Central Law Journal.

ST. LOUIS, OCTOBER 3, 1884.

CURRENT TOPICS.

The comments made by us upon Judge Henry's speech in regard to contingent fees has brought forth the following from William L. Webber, Esq., of East Saginaw, Mich.:

Editor Central Law Journal:

The subject of contingent fees spoken of editorially in your number of Sept. 5th, is one of much interest to those concerned with the administration of justice and the reputation of judicial proceedings. I think every lawyer of large practice will agree with Judge Henry in his criticisms, and that the effect of bargains which unite the attorney with the client, as the party in interest is directly opposite that contemplated in the office of an attorney and counsellor-at-law. The lawyer is supposed to aid the court in arriving at the truth. But wuere he becomes the party—particularly where, as in many cases, his conscience is not particularly troublesome—he is interested, by fair means or foul, to secure success—right or wrong. Tampering with juries and subornation of perjury are common results of this practice, as well as a lowering of that tone which should characterize the position of one holding an office, the duty of which is to aid in the administration of justice.

In your editorial remarks you say that sometimes "it greatly assists the poor man in obtaining justice against wealthy, oppressive corporations." If the poor man cannot otherwise obtain justice, let there be statutes enacted so that public officials may be appointed to see that justice is correctly administered, even if it be at the public expense. The public will suffer less by paying the bills, when properly incurred, than by this corruption of justice which these "half and half" lawsuits promote.

And in regard to railroad corporations, is it not a fact universally conceded that the construction, maintenance and operation of railroads by corporations have become a necessity, that the business of this generation may be carried on? And if this be so, as it is now, (with the exception of a few old special charters), universally conceded that the legislature has power to control all railroad corporations—would it not be a long step toward the solution of the railroad problem if the press, the people and the legislature would treat railroad corporations more as they treat municipal corporations—make such laws as seem to be proper for their government, and then punish those officers occupying the positions of president, general manager, or others who refuse to carry these laws into effect? The stockholder who buys for investment as much needs protection against the stockholder who buys to gamble, or the official who uses his position as a railroad wrecker, as do the public who seek to use the road only for purpose of transportation. And yet this current mode of legislating against the corporation itself inflicts penalties upon stockholders without touching those who are really guilty. Railroad corporations being managed by men and being *quasi* public corporations, no reason is perceived why these men should not be subjected by penal enactments to answer for their misdoings, and no reason is seen why the stockholder who buys for investment should be mulcted in penalties for the acts of those who have swindled him.

WILLIAM L. WEBBER.

This presents the matter in some measure in a little different light from that heretofore considered. The suggestion made by Mr. Webber, with regard to the employment of public attorneys to carry on litigation for poor men against capital is in some measure a good one, but it seems to us that poor men will object to having their causes tried by those who are open to bribery by their adversaries. The lawyer who is working for a contingent fee, will do his best to secure justice for his client, but we have seen causes often go by default because of the *probably corrupt* indifference of the attorney. The temptation of money is strong and the legal profession is no different from any other in the matter of resistance to it. Human frailty exists therein to the same extent as in other classes of men. The dangers of subornation of perjury are perhaps no greater than those which would attend the working of Mr. Webber's system. The suggestion, however, is worthy of consideration in the legislature, and we trust he will urge it where it may be well considered. With regard to the remainder of the letter, it is evident that our correspondent is permitting his honest prejudices to overpower him. With matters of political economy, we have naught to do. Whether railroads are a public benefit or are hostile to public interests, is not for us to contend; it is not within our sphere. We are a law journal, conducting our business for the welfare of the lawyer, *as a lawyer*, we confine ourselves to discussion of matters pertaining to law and lawyers strictly, and by no act of ours will politics find any place in our columns.

An interesting point on the Sunday law has just been decided by Judge Caldwell of the United States Circuit Court for the Eastern District of Arkansas, in Swann v. Swann. There is a rule in the law of contracts that any agreement contrary to the public policy of the State is void. There is another rule that the comity we owe to other States or nations requires us to give effect to contracts entered into in their jurisdictions according to their laws. There is a third principle that

that comity will not be extended when the contract is in conflict with the settled public policy of the State, or, as Judge Redfield once expressed it "as being of evil example to our citizens to see such a contract enforced in a court of justice." The public policy of a State is seen either in the sentiments of the people, the necessities of the State or its legislative enactments. The legislature is presumed to embody in its official acts the sense of the people, and when a legislature in the plainest terms declares that the first day of the week shall be a day of rest, whether it be from a sense of recognition of the religious sentiments of what it deems its constituency, or whether it be out of regard for the physical and moral necessities of the people, or, as Judge Caldwell says, "to enable them to renew flagging energies," "prevent premature decay," etc., it is a fact that no judicial hair-splitting can make little of, or explain away, that the seal of condemnation is placed upon any efforts to do anything secular on that day, under the pain of penalties, civil as well as criminal, simply because it is the policy of the State to discourage such efforts. The courts in framing their rules regard the consequences of their adoption, and when Judge Caldwell declares, as he has done, that a contract made on Sunday in Tennessee, where the Sunday law was not broad enough to include the contract in question within its operation, enforcible in the courts of justice maintained at the expense of the very people who, through their legislative oracles had denounced it as opposed to their policy, he forgets not only the first principle which should govern judges in administering justice, i. e., regard to the public welfare; but he pays no heed to the consequences, and overlooks the fact that all that is required of men having contempt for the laws of the State, is a short trip across the borders into a State where different ideas prevail, and a demand upon the home tribunals of justice upon their return must be obeyed. If that be the correct estimate of the comity we owe to other States, we are glad to become familiar with it, but we cannot believe, with all due deference to the judgment of the learned judge, that his conclusion is a sound one, or worthy of being followed.

WAIVER OF MECHANICS' LIENS.

The lien of the mechanic being a personal privilege conferred upon him by statute may be waived by the person for whose benefit the right is given. What acts of the mechanic will constitute a waiver of his lien is the question that we propose to examine briefly in this article.

There is no doubt that if the contractor in his contract with the owner expressly agree to waive his right to claim a lien, he is barred from enforcing it afterwards;[1] and not only does such an agreement prevent the original contractor from enforcing a lien, but the sub-contractors also.[2] Nor is it necessary that the contract to waive the lien be express, as an implied agreement to do so will accomplish the same purpose if the intention to waive the lien is sufficiently clear.

An agreement to waive the lien will be implied from another agreement to accept other security inconsistent with the mechanic's lien as payment of the contract price.[3] In these cases it was agreed to accept mortgages on the premises built upon, in payment for the contract price and it was held to be a waiver of the lien. However if the agreement be to extend the time beyond the period allowed by law to enforce the lien, provided a mortgage be given the agreement will not defeat the lien, if the owner fails to give the mortgage;[4] but if the lienor absolutely agree to take a mortgage on the land on which the building is erected, the lien is waived, and he must either sue for damages, or file his bill for specific performance, in case the owner does not carry out his part of the agreement.[5]

Although an agreement to take a mortgage on the same or other land for the contract price, waives the lien, an agreement to take other land as payment for work and materials

[1] McLaughlin v. Reinhart, 54 Md. 71; Iron Company v. Murray, 38 Ohio St. 323; Bowen v. Aubrey, 22 Cal. 566; Phil. Mech. Liens, 389; Quick v. Corlies, 10 Vroom. 11.

[2] Bowen v. Aubrey, *supra*.

[3] Weaver v. Demuth, 40 N. J. L. 238; Barrows v. Baughman, 9 Mich. 213; Gardner v. Hall, 29 Ill. 277.

[4] Gardner v. Hall, *supra*, and it seems that the same doctrine is held in Weaver v. Demuth, 40 N. J. L., 238; wherein it was implied that if the mechanic could show an inability of the owner to execute a good and valid mortgage, he did not lose his lien by his agreement to accept a mortgage upon the premises.

[5] Weaver v. Demuth, *supra*.

does not defeat the right to resort to the lien in case the land is not given according to the terms of the contract.[6] In Barrows v. Baughman the court say: "The lien authorized by the statute is intended as a security for the payment of the debt, and can only be enforced as a means of compelling payment. Doubtless such lien may attach and be enforced to compel payment whether the debt be payable in cash or otherwise." Nor will an agreement to waive the lien be implied from an agreement of the contractor to pay and discharge all claims for labor and materials furnished so that there shall be no liens on the premises,[7] and if the contractor agree that no other person or subcontractor should fill a lien, his agreement does not prevent him from doing so himself.[8]

Sometimes the contractor commits some act which by implication of law constitutes a waiver of his right to enforce his lien.[9] Thus he is estopped from setting up his lien if he induces a third person to purchase the property on which he claims a lien by representing to him that he has other means of collecting the contract price.[10] So, too, he loses his lien if he jojn in a conveyance of the property on which he claims his lien,[11] and if the mechanic releases his lien for the owner to make a loan upon the premises, he loses it.[12]

An assignment by the contractor of his claim against the owner is a waiver of his lien.[13] In these cases it was held that the benefits conferred by the lien law were personal and could only be taken advantage of by the person for whose benefit the law was enacted. Nor will a reassignment of the claim to the mechanic allow him to enforce his lien.[14] However some cases hold that the lien is assignable and that the assignee can enforce it in his own name.[15] Perhaps the true state of the law is that before the mechanic has perfected his lien an assignment of his claim will not carry with it the lien, but when the lien has been once perfected it may be assigned and the assignee may enforce it in his own name.[16]

If an agreement to accept other security for labor and material furnished in the erection of a building, amounts in law to a waiver of a lien therefor, so much the more would the acceptance of such security waive the lien. In the first case no valid lien attaches at all, and in the second, although the lien may have attached, it becomes of no avail by the acceptance of any security inconsistent with the existence of the lien. The acceptance of a real estate mortgage upon the same property upon which the lien is claimed amounts to a waiver of the lien.[17] A doubt as to whether the same rule would apply in case the mortgage was given on other property than that on which the lien would attach was raised in one case,[18] but the other cases cited seem to take it for granted that there would be no difference on what property the mortgage was given. However it has been held that taking a mortgage upon the same land on which the lien is claimed will not divest the lien.[19] In this case the court held that taking a mortgage on the same premises on which the lien had attached was not taking collateral security, and for this reason the lien was not lost. In Grant v. Strong, the mechanic agreed to do the work and furnish material for building several houses, one of which he was to have

[6] Barrows v. Baughman, 9 Mich. 213; Bayard v. McGraw, 1 Ill. App. 134; Phil. Mech. Liens, § 129. Reiley v. Ward, 4 Green. (Ia.) 21; McLaughlin v. Reinhart, 54 Md. 71; Hinchman v. Lybrand, 14 S. & R. 32; Protection Insurance Co. v. Hall, *et al.* 15 B. Mon. 411; Haviland v. Pratt, 1 Phila. 364. However for a modification of this rule see Campbell v. Saife, 1 Phila. 187.

[7] Mulrey v. Barron, 11 Allen 152.

[8] Young v. Lyman, 9 Pa. St. 449.

[9] Phil. Mech. Lien, 389; Gorman v. Gayner, 22 Mo. 137.

[10] Scott v. Orbison, 21 Ark. 202.

[11] Alexanders v. Gilbert, 7 B. Mon. 351.

[12] Phillips v. Gilbert, 2 MacAr. 415.

[13] Fitzgerald v. Trustees, etc., 1 Mich. N. P. 243; Roberts v. Fowler, 4 Abbt. Pr. 263; Caldwell v. Lawrence, 10 Wis. 273; Pearsons v. Fincker, 36 Me. 384.

[14] Tewksbury v. Bronson, 48 Wis. 581.

[15] Jaege v. Bossieux, 15 Grat. 83; Kerr v. Moore, 54 Miss. 286; Skyrme v. Occidental Co. 8 Nev. 219; Ritter v. Stevenson, 7 Cal. 388; Tuttle v. Howe, 14 Minn. 145. In this case it was held that as the statute provided that executors and administrators have the same right that their testator or intestate would have if living, thus giving them the power to enforce a lien of the deceased, then the assignee would have the same right, on the principle that whatever rights of action, or of property, survive to an executor or administrator are assignable. The People v. Tioga C. P. 19 Wend. 73; Sears v. Conover, 34 Barb. 330; Hoyt v. Thompson, 1 Selden, 347.

[16] Brown v. Smith 55 Ia. 31; Langan v. Sankey, 55 Ib. 52; Merchant v. Ottumwa Co. 54 Ib. 451; see also Ritter v. Stevenson, 7 Cal. 388; Davis v. Bilsland, 18 Wall. 659.

[17] Barrows v. Baughman, 9 Mich. 213; Trollinger v. Koford, 7 Oregon, 228.

[18] Gorman v. Sagner, 22 Mo. 137.

[19] Gilchrist v. Gottschalk, 39 Ia. 311.

in payment. A deed was executed and placed in the hands of a third party as an escrow to be delivered when the buildings were completed. Afterwards the deed was given up and a note taken for the amount due. On a bill being filed to enforce a lien, the court held that the giving of the deed in trust to secure the payment of the debt amounted to a waiver of the lien.[20]

The acceptance of a chattel mortgage to secure the mechanic's pay waives his lien.[21] In this case the court say: "We have said in Brady v. Anderson, taking other security either on property or that of individuals not parties to the transaction would have the effect to discharge the lien. Here security was taken on personal property duly mortgaged and the lien was discharged thereby." But the mortgage may be cancelled and the lien restored by agreement of the parties.[22]

From analogy we should think that if the mechanic accepted a bond with power of attorney to confess judgment, to secure the payment of his claim he would waive his lien. But it has been held that such was not the case. In Thompson's case the court says: "It is a general rule that the acceptance of a higher security than the creditor had before is an extinguishment of the first debt. * * * * In the case before us the debts of the mechanics or lumber merchants were originally simple contract debts; but for the security of these debts the act has created a lien on the building, so that the security which the creditors had in relation to the safety of the debts ranked with that of a judgment or mortgage."[23] Hence because the court thought that the lien and judgment were of equal dignity, it was held that the lien was not discharged. However, the reasoning in this case was questioned in a later one, although the same result was reached.[24] Following these cases is one in California as to the same effect.[25] This would certainly be the rule in those States where it is provided by statute that the Mechanics' common law remedy for the collection of the debt is in no wise impaired by the law giving him a lien. He may prosecute to judgment a suit for the debt and enforce his lien besides.[26]

The most important point in connection with the question of waiver of liens arises in case the mechanic has accepted the promissory note of the debtor. It would seem as if there could be no question that accepting a note would not waive the lien and this is the way that the weight of authority tends, but some cases hold that if the mechanic accepts the note of the debtor he thereby waives his lien.[27] In the case of An Sable Boom Co. vs. Sandborn it was held that by taking time acceptances for labor on logs, the parties entitled to a lien waived it, and that it could not be revived when the acceptances became due and were not paid. Cooley, J., in giving the opinion of the court, said: "The taking of acceptances according to the well-settled doctrine in this State was not payment of the demand in the absence of evidence of an agreement that they should be received in payment. There is no evidence of such an agreement here. It does appear, however, that the acceptances taken were payable at a future day and we understand from the finding that they covered the whole amount then due. As no agreement to the contrary is shown, the owners of the logs must have had the right to demand and receive them at any time subject to the payment only of any sum then due; for we cannot imply an undertaking that the logs on hand should be retained as security for the payment at a future time of a sum not presently payable. The owners of the logs, therefore, must have had a right to remove them after the acceptances were given, and, if so, there could have been no lien, and a lien once lost could not be revived by the maturing of the acceptances. If once waived it is permanently lost." So, too, in Hutchens vs. Olcutt the question of the effect of giving a promissory note to a person entitled to a lien for labor, came up, and it was held that the lien was waived thereby. The court say: "We are disposed to say that the accepting of a negotiable promissory note in payment of an account for labor bestowed on any arti-

[20] 18 Wall. 623; see also Gorman v. Sagner, *supra*.
[21] Kinzey v. Thomas, 28 Ill. 505.
[22] 24 Ill. 114; Getchell & Sons v. Musgrove, 54 Ia. 744.
[23] 2 Browne (Pa.) 297.
[24] Crean v. McFee, 2 Miles 214.
[25] Germania Building Co. v. Wagner, 61 Cal. 349.
[26] Laws of Mich. 1879, page 276; Ehlers v. Elder, 51 Miss. 495.
[27] An Sable Boom Co. v. Sanborn, 36 Mich. 358; Hutchin v. Olcutt, 4 Vt. 549.

cles is such a manifest intention of the party taking the note to rely on the personal security of the maker of the note as to be a waiver of any lien which he might have had on the articles on which the labor was bestowed, whether such note is payable on demand or at a future time, and whether negotiable or not, that the taking such note is of itself a waiver of any lien which the law gave as a charge upon the property on which the labor was bestowed." However, in these cases the lien was upon personal property and it was doubtless for this reason that it was held that the acceptance of notes by the lienor caused him to lose his lien.

When the lien is upon real estate it seems to be well settled that the mere acceptance of a note by the mechanic will not effect his lien,[28] and we can see no good reason why such should not be the case. The giving a note is not payment of the debt, but rather evidence of it, and until it is paid why should the mere fact that the mechanic and debtor had liquidated their account work to the prejudice of the mechanic? In Milwain v. Sanford, the court say: "The mere giving a note for material furnished for a building does not destroy the lien which the person furnishing the materials would have had, had the note not been given. So long as the note remains in the hands of the person furnishing the articles it is a mere adjustment of the amount due, and a written instead of a verbal promise to pay it." And in McMurray v. Taylor, it was said: "The giving of a day for payment was a benefit to the defendant and it did not injure him, as it was within the time within which the plaintiffs were required by law to bring their suit to enforce the lien. Without the note the plaintiffs might have delayed suit beyond the time of payment given to the defendant. As the note did not extinguish the account, nor the delay injure the defendant on what ground or principle can it be maintained that the plaintiffs have lost or waived their right to enforce the lien?" It seems to be well settled that if the time for the payment of the note does not extend beyond the period within which suit must be brought to enforce the lien, and if the note has not passed from the control of the lienor, the lien is not affected by the note. But if the time for the payment of the note be extended beyond the time within which suit must be brought to enforce the lien there is such a presumption of intention to waive the lien, that it cannot be enforced.[29] However, extending the time of payment of the note beyond the period allowed for filing the lien does not waive it, if it still be within the time allowed for beginning the action to foreclose.[30]

As to the effect of a negotiation of the note there seems to be considerable conflict of opinion. In Scott v. Ward, Green, J., says: "If the note had been negotiated or had passed from the plaintiff's control to the ownership of another, the lien given by statute would be lost. Such transfer would in law be regarded as a waiver of the lien."[31] But the better doctrine seems to be that mere negotiation will not defeat the lien, if the note can be produced at the trial, and the defendant be freed from all evil consequences resulting from the negotiation.[32]

The same rules as to acceptance and negotiation of notes apply to the subcontractor as to the original contractor, and if the subcontractor accept the notes of the original contractor he waives no right except such as the contractor would have waived had the notes been given by the owner to him.[33]

ISAAC N. PAYNE.

Detroit, Mich.

[28] McMurray v. Taylor, 30 Mo. 263; Ehlers v. Elder, 51 Miss. 495; Goble v. Gale, 7 Blackf. 218; Scott v. Ward, 4 Greene (Ia.) 112; Logan v. Attix, 7 Ia. 77; Brady v. Anderson, 24 Ill. 111; Mix v. Ely, 2 Greene (Ia.) 513; Greene v. Ely, Ib. 508; Milwain v. Sanford, 3 Minn. 147; Edwards v. Derrickson, 28 N. J. L. 39; Doane v. Clinton, 2 Utah, 417; Miller v. Moore, 1 E. D. Smith 739. Bodley v. Denmead, 1 W. Vir. 249. But if the notes of a third person be accepted the lien will be lost. Dutton v. N. E. Mutual Fire Ins. Co. 29 N. H. 153.

[29] Greene v. Fox, 7 Allen, 85; Ehlers v. Elder, 51 Miss. 495; Graham v. Holt 4 B. Monroe, 64.

[30] Miller v. Moore, 1 E. D. Smith, 739; Ashdown v. Woods, 31 Mo. 465.

[31] 4 Greene (Ia.) 112.

[32] Graham v. Holt, 4 B. Mon. 61; Morrison v. Steamboat Laura, 40 Mo. 260; Steamboat Charlotte v. Kingsland, 9 Ib. 67: Teaz v. Chrystie, 2 Abbt. Pr. 109; Sweet v. James, 3 R. I. 270; Morton v. Austin, 12 Cush. 389.

[33] Miller v. Moore, 1 E. D. Smith, 739.

THE RELATION OF RAILWAYS TO THE STATE.

The relation of railroads to the State seems now to be settled. It is a problem full of interest.

The State created railroads, endowing them with franchises solely for public accommodation and the promotion of the public interests. It requires large capital to operate them, so the State permits corporations to construct and use them. The benefits to be derived by the shareholder from their operation are incidental, to the primary object, i.e. popular welfare.[1] Their establishment is a part of the State's function. The function performed is a public one; the agents are private corporations. If they should refuse to the public the use of their roads, the courts will afford redress. They have been given the right of eminent domain, and municipal corporations have been empowered to aid in the construction of railways,[2] for the establishment and maintenance of public highways, and for the promotion of the public interest.[3] Whatever is a public use must of necessity be a State or a national use, in furtherance of a State or a national duty.

These corporations are private; their work, public. The operation and use of railways are public just as if they were constructed by the State.[4] The legislature may, by general law, impose upon the corporations new conditions, not contained in their charter, conducive to the public weal.[5] All their property is vested in them, but in trust for the public.[6] All their vested rights are held in trust for the people. So when these corporations take public lands by purchase, they take them for the use of the people.[7] The right of eminent domain is a right which cannot be delegated to any corporation to be held for private advantage. No corporation has property in its roads, though it may have franchises annexed to them.[8]

The English decisions hold with ours, that railways are public highways, and that the State may intervene to prevent them from being used for other purposes, and compel the companies to maintain them for those purposes.[9]

Railroad corporations are subject to the same controlling power of the State as natural persons. These corporations are the creation of the State and must submit to regulation.[10] As to legislative control, natural persons and corporations are placed precisely on the same footing, and upon this principle only can equal rights and just liabilities be fairly based.[11]

Railroads, by the law of New Hampshire, are public corporations, so far as to be subject in many respects to general legislation and control of the public authority. They are created to further a public object, and are bound to the State for the performance of their public duty. They can do no act which will amount to a renunciation of that duty or will directly and necessarily disable them from performing it. They cannot convey their franchises and corporate rights.[12]

The contract between the railroad corporation and the State is expressed in a charter. This contract, like contracts between individuals, is protected by the clause in the United States Constitution, which inhibits any State laws impairing the obligation of contracts.[13]

Grants to corporations are strictly construed; *i. e.*, corporations have delegated to them specific powers, and such as are necessary for the purpose of carrying into effect such powers, and none others.[14]

Charters are granted to railroad corporations upon the implied condition that their franchises shall be used subject to the power of the State to impose such reasonable regulations upon them as the comforts, safety, and welfare of society may demand.[15]

Political power delegated by the legislature cannot become a vested right as against the State. Corporations cannot set up vested right as against the government, merely because they have been conferred upon them

1 R. R. Co. v. Mining Co., 68 Ill. 489.
2 Olcott v. Supervisors, 16 Wall. 694.
3 Queensbury v. Culver, 19 Wall. 91.
4 Township v. Talcott, 19 Wall. 676.
5 Brannin v. R. R. Co., 31 Vt. 214.
6 Worcester v. R. R. Corp., 4 Met. 566.
7 People v. White, 11 Barb., 26.
8 Erie R. Co. v. Casey, 26 Pa. St. 287.
9 Rex v. R. Co., 2 B. & Ald., 646; Reg. v. Eastern etc. R. Co., 10 Ad. & El. 531.
10 Wiggins Ferry Co. v. E. St. Louis, 102 Ill. 560.
11 Thorpe v. R. Co., 27 Vt. 145.
12 Pierce v. Emery, 32 N. H. 504.
13 2 Kent, 272, 275.
14 Perrine v. Chesapeake, etc. Co. 9 How. 172; Com. v. Erie R. Co. 27 Pa. St. 339.
15 C. & A. R. Co. v. People, 105 Ill., 657.

by the legislature.[16] In the Dartmouth College case, the Federal Supreme Court held not that a charter is a contract, but that when a contract is contained in a charter, it is inviolable. Waite, C. J., has said that it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain.[17] But a contract may be void between the State and a corporation. The legislature can grant only such franchises as is within the power which the people have delegated to it. Any agreement in a charter which restricts or curtails the police power of the State is void; and though the corporation may have paid the State a valuable consideration therefor, the legislature may annul its agreement.[18] When a charter contains a contract that the railroad corporation may fix reasonable fares and freight rates the State may, in the exercise of the police power of the State, ignore such agreement and prescribe rates and fares.[19] It is settled that the legislature cannot part with its power over all questions in which the public are concerned in any manner which would disable it from continuing its exercise. It is its duty to protect the people. It can and should exercise its power as often as the people's interests demand for their weal. Its members are trustees for the people on the subject, and possess no authority to grant or sell their power over the trust to corporations or individuals.[20] Railroad companies are subject to the police powers of the State, and laws passed in execution of that power, impair the obligation of no contract. They may impair the value of their franchises, or of their rights held under contract, but they are not within the constitutional inhibition.[21]

A charter contract can be declared void when its powers militate against public welfare.[22] So where a lottery was established by charter, the Federal Supreme Court held the contract void, because lotteries are of an immoral and demoralizing character, and the legislature cannot part with its control over them.

In the Dartmouth College case the court held, that "if the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government * * * the subject is one in which the legislature of the State may act according to its own judgment."

"The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the constitution; and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self-preservation." "They are (governmental powers) intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature, disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the people."[24]

"As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign; so contracts must be understood, as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."[25]

A decision, lately rendered in Mississippi, seems to be in direct conflict with some of these views.[26] In this case it is held that the right to fix and regulate the rates of transportation is not incidental to the police power of the State; and an act making it lawful for a railroad company to fix its own charges, is

16 People v. Morris, 13 Wend. 331.

17 Stone v. Mississippi, 101 U. S. 814.

18 Boyd v. Alabama, 94 U. S. 645; Stone v. Mississippi, 101 U. S. 814; Metropolitan etc. v. Farris, 34 N.Y. 657.

19 Ruggles v. People, 91 Ill. 256; R. Co. v. People, 95 Ill. 313.

20 Johnson v. McIntosh, 8 Wheat. 597; Mott v. R. Co., 30 Pa. St., 35; Toledo Bank v. Bond, 1 Ohio St. 659.

21 Vanderbilt v. Adams, 7 Cow. 349; Baker v. Boston, 12 Pick. 194; Benson v. Mayor, 10 Barb. 245.

22 Stone v. Mississippi, 101 U. S. 814.

23 West River Co. v Dix, 6 How. 531, 532.

24 2 Greenleaf's Cruise, 68, note.

25 Legal Tender Cases, 12 Wall. 551.

26 Farmers' etc. Co. v. Stone, U. S. C. C. D. Miss. 18 Cent. L. J. 472.

a contract whose obligation the legislature cannot impair by regulation of such rates.

This decision seems to be in direct conflict with two Illinois decisions,[27] and it is not in conformity with those rendered by the U. S. Supreme Court.

Chief Justice Taney defines the police power of a State to be "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law or a law to punish offences, or to establish courts of justice, or to require certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

D. H. PINGREY.

Bloomington, Ill.

[27] Ruggles v. People, 91 Ill. 256; R. Co. v. People, 95 Ill. 313.

[28] License Cases, 5 How. (U. S.) 583.

SALE OR BAILMENT.

It is the glory of the common law, that its "plastic and accommodating nature" lends itself readily to the varying exigencies of modern civilization, yet occasionally, a case arises where it is as difficult to accommodate old principles to new facts as old wine to new bottles. For example: It is at present the universal custom to store grain in "bulk" —that is, to put all grain of like kind and quality in the same bin of an elevator. The convenience of this method is obvious. It greatly economizes space, and thereby reduces the expense of storage. If a special bin were required for every particular bailment, it would be necessary to construct elevators like beehives with an infinite number of cells whose division walls would require as much space as the grain stored. For convenience and economy, therefore, it is usually agreed that all grain of the same kind and quality shall be mixed together. Receipts are issued to depositors for the number of bushels stored —who become "tenants in common" of the entire mass.[1] So far, little difficulty is found in determining the mutual rights and obligations of the depositors and warehouseman. The contract is one of bailment. The warehouseman is bound to use reasonable care in the conduct of his house. If loss is suffered without his fault, it falls upon the depositors —who share *pro rata*. A different state of facts may, and in fact, usually does, arise, in the conduct of elevators. Grain is put in at the top of a bin as fast as it is drawn out at the bottom, and it may well happen, that none of the identical grain for which receipts are outstanding, will remain in store. The question now is, upon whom shall a loss fall, in case of damage by fire or inevitable accident? The holder of a receipt urges that none of his grain has been injured. It passed through the elevator and was delivered to other parties. The bailee is bound to replace his property by an equivalent and cannot deliver to him damaged inferior grain. In support of this position, it may be urged that the facts above stated, constitute a sale and not a bailment. They cannot be brought within any definition of bailment, found in the books. "Bailment is a delivery of goods in trust upon a contract express or implied, that the trust should be duly executed, and the goods restored by the bailee." If we add "as delivered to the agent or representative of the bailor"—the definition is broad enough to cover all disputed ground.[2]

Where the grain stored has been delivered to any one except the holder of the receipt

[1] Chase v. Washburn, 1 Ohio St. 244; Cushing v. Bond, 14 Allen 380.

[2] Bouv. Dict. Story Bail, Sec. 2; 2 Black Com. 395; Jones on Bail, 1, 117; Coggs v. Bernard, 2 Ld. Raym. 917; Schouler on B. 2; Hammond Lectures on Bail., 3; 2 Kent. 550.

issued for it, it cannot be returned to the bailor. If done without authority, the grain has been converted; if by permission, the transaction is a sale and not a bailment, for wherever a thing is declared to be accounted for in kind or value the property in it passes to the bailee or vendee. In either case where a loss occurs it must fall on the bailee or vendee, for on the one hand he has converted the goods to his own use, on the other, he has the property therein.[3]

The obvious injustice of such a conclusion, its manifest inconsistency with the intention of the parties and its practical inconvenience have led to its final rejection, notwithstanding the cogency of the argument by which it is sustained. If it had been permitted to prevail, every warehouseman who carried on the business of storing grain, as now conducted, would be an insurer of the grain in his elevator—against all casualties whatsoever, whether or not he contracts to the contrary.

The holder of a receipt would be in no better position than a general creditor of the warehouseman, to the amount of grain deposited. The warehouseman might conduct his business like a bank, and issue certificates of deposit. So long as he keeps on hand grain enough to meet current demands, no one has a right to complain. The statutes of most of the States and the parties themselves contemplated quite a different relation. The holder of a warehouse receipt is presumed to be the owner of goods actually in store, if not of the identical goods originally deposited, yet goods of an equivalent amount of equal quality, by which they have been replaced. No one would be more ready to proclaim this theory of right than the holder of the receipt himself, where he is brought into conflict with a general creditor of a warehouseman, although he might be reluctant to confess it, if the elevator and contents were destroyed by fire or inevitable accident. The courts have cured the anomaly by confessing it. The contract more nearly resembles a bailment than a sale; accordingly the principles of right applicable to bailments determine the rights of the parties. Where, therefore, grain is stored in an elevator with the understanding that it may be mixed with and accounted for in other grain of like quality and kind, the transaction is a bailment and not a sale, definitions to the contrary notwithstanding.[4]

ISAAC H. LIONBERGER.

St. Louis, Mo.

3 Chase v. Washburn, 1 Ohio St. 244; Richardson v. Olmstead, 74 Ill. 213. See civil law Mutuum Inst. lib. 3 tit. 15, Dig. lib. 44 tit 9. Pothier Pand. lib. 12, tit. 1 No. 9 and 10; Jones on Bailment, 64-102 etc. Johnston v. Browne, 39 Iowa 200; Norton v. Woodruff, 2 Comst. 155: Smith v. Clarke, 21 Wend. 84; Hurd v. West, 7 Cow. 752; Baker v. Roberts, 8 Greenl. 101; Ewing v. French, 1 Blackf. 354; Wilson v. Cooper, 10 Iowa 565; Buffman v. Merry, 3 Mason, 478: 2 Kent Com. 589; Story on Bail. 193 7 N. Y. 433; Brown v. Hitchcock, 28 Vt. 452; Richardson v. Olmstead, 74 Ill. 213; Mallory v. Willis, 4 Comst. 77, 85; Pilice v. Schenck, 3 Hall, 28; Carlisle v. Wallace, 12 Ind. 252; Dickson v. Cass Co., etc. 42 Iowa, 38.

4 Nelson v. Brown, 44 Iowa 455; Nelson v. Brown, 53 Iowa, 555; Chase v. Washburn, 1 Ohio St. 244; German Natl. Bk. v. Meadowcroft 4 Brad. 636; Ledyard v. Hibbard, 14 Rep. 213; Dows v. Ekstrone, 1 McCrary, 434; Greenlief v. Daws, 3 McCrary 27; Young v. Miles, 20 Wis. 615.

CONTEMPT — INTERLOCUTORY ORDER — COMMITMENT FOR DISOBEDIENCE — CIVIL OR CRIMINAL — IMPRISONMENT FOR DEBT.

HENDRYX v. FITZPATRICK.

United States Circuit Court, D. Massachusetts.

An order in a patent suit, upon a defendant to pay certain fees and damages, is not a final decree in a criminal case, and a commitment for disobedience thereof, is not for a criminal contempt, but is imprisonment for debt, from which the administration of the poor debtor's oath, under the laws of the State, discharges him.

In Equity.

Plaintiff filed a petition to commit defendant for contempt of court. The facts sufficiently appear in the opinion.

T. W. Porter and *J. Mc C. Perkins*, for plaintiff; *A. H. Briggs*, for defendant.

LOWELL, J., delivered the opinion of the court:

In this case the defendant was enjoined from infringing a patent, *pendente lite*, because, though the court had serious doubts of its validity, the defendant had himself sold the patent to the plaintiffs for a considerable sum of money, and it was thought no more than justice than he should refrain from violating his own implied warranty until the final hearing. Afterward, proceedings for contempt for a violation of the injunction were prosecuted by the plaintiffs, and after evidence taken and a hearing, the defendant was ordered to pay the fees of the master by a certain day, the costs of the proceedings, and certain profits assessed by the master, by certain other days, and in default of payment to be committed. These last

two sums when paid in were to be paid out to the plaintiffs. The defendant failed to make the last two payments, and was committed to prison. After he had been in confinement for about two weeks, the district judge, with my approval, though I was unable to sit in the case, permitted the defendant to go before the master, and prove, if he could, in proceedings like those under the poor debtor law of Massachusetts, that he had no property which he could apply to the payment of his debts. The plaintiffs were duly notified of the hearing before the master and did not attend, and the master admitted the defendant to take the poor debtor's oath; and thereupon the court discharged him on his own recognizance. The plaintiffs now move that the defendant may be recommitted under the original order. They argue that every order since made in the cause is *ultra vires* and void; because the first order was a final decree in a criminal case, and could not be varied after the term; and because the defendant could only be discharged from arrest by the pardon of the president.

It would be a sufficient answer to this argument that if the order was a criminal one, having the consequences contended for, the fine should have been made payable to the United States, and the plaintiffs would have no concern with it; but we will explain why all the orders are, in our opinion, proper.

The original order was an interlocutory civil order, for the benefit of the plaintiffs; and the commitment was for failure to pay the money, not for the original contempt. While, therefore, the imprisonment may not have been strictly and technically within our poor debtor law (Rev. Stats. § 991), which, however, we think it was, yet it should, at all events, be governed by similar rules. It was made in this way, because the master found that the contempt was not wilful, and I thought that no punishment was necessary.

The process of contempt has two distinct functions: one, criminal, to punish disobedience; the other, civil and remedial, to enforce a decree of the court and indemnify private persons. In patent causes it has been usual to combine the two, and to order punishment if it is thought proper, or indemnity to the plaintiff, if that is all that justice requires, or both. Re Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Ib. 45; Shillinger v. Gunther, 14 Ib. 152; Phillips v. Detroit, 3 Ban. & A. 150; Dunks v. Grey, 3 Fed. Rep. 862; Searls v. Worden, 13 Ib. 716; Matthews v. Spangenberg, 15 Ib. 813. We are aware that it was, at one time, the opinion of Judge Blatchford that a sum of money ordered to be paid to a plaintiff in a cause of this kind was a criminal fine, which could only be remitted by a pardon, but we are of opinion that such a fine for the benefit of a private person can not be remitted by the president, and is a debt of a civil nature, and that Judge Blatchford has so treated it in the latest case which has come before him. His first opinion is stated in Mullee's case, 7 Blatchf. 23, and Fischer v. Hayes, 6 Fed. Rep. 63; but when the latter case came before the supreme court, they expressed a significant doubt whether the order to pay money for the use of the plaintiff was not an interlocutory decree in a civil cause; Hayes v. Fischer, 102 U. S. 121; and when the case came back Judge Blatchford admitted the defendant to bail; Fischer v. Hayes, 7 Fed. Rep. 96; which he could not have done if the judgment were criminal in its nature. The doubt of the supreme court might well have been even more strongly expressed. An order upon a defaulting trustee, assignee in bankruptcy, or other person subject to account, to pay money into court, is civil, and may be waived by the party adversely interested, and is a debt to which a bankrupt law, discharging the debt, and an insolvent law, discharging the person, are applicable. See Baker's case, 2 Strange, 1152; Ex parte Parker, 3 Ves. 554; and the decisions hereinafter cited. In McWilliams' case, 1 Sch. & Lef. 169, a defendant in contempt for not paying a legacy into the court of chancery in obedience to its order was attached while attending the commissioner to be examined as a bankrupt. His arrest was lawful, if the contempt was a criminal offence. That very learned chancery lawyer, Lord Redesdale, said that it was merely a mode of enforcing a debt; that if it were not so he had no right to make the original order; that the substance, and not the form of the proceeding, must govern, and its substance was not criminal. The petitioner was discharged. The same point was decided in the same way in *Ex parte* Jeyes, 3 Dea. & Ch. 764; and *Ex parte* Bury, 3 M., D. & De G. 309. The remark of the lord chancellor in McWilliams' case, that he had no right to make an order of this sort for the benefit of a private person, excepting as a civil remedy, is highly pertinent to this case. Where a person had been committed to prison for nine months for contempt in not paying money into a county court, sitting in bankruptcy, James, L. J., said: "The order, on the face of it, is wrong, for it is an absolute order of committment for contempt of court for non-payment of money. This is a penal sentence. The court of chancery never made an order in this form." And again: "The order of committment was such as had never been made in the court of chancery, and was justly characterized by the chief judge as novel and surprising." *Ex parte* Hooson, L. R. 8 Ch. 231.

This distinction is preserved in our Revised Statutes. The courts have power to punish for contempt; sec. 725; but all forms and modes of proceeding which are usual in equity may be followed in cases in equity. Sec. 913. By virtue of sec. 725 the district court may punish contempts. Like power is given the district judge when sitting in chambers, in bankruptcy, by sec. 4973; and the cognate but distinct power of enforcing his decrees "by process of contempt, and other 'remedial' process," is recognized by sec. 4975. See *In re* Chiles, 22 Wall. 157. Some of the older

cases hold that, in contempt in civil cases at common law, the proceedings, after the order of attachment, should be on the crown side of the court; that is, in the name of the sovereign. The King v. The Sheriff of Middlesex, 3 T. R. 133; Same v. Same, 7 T. R. 439; Folger v. Hoogland, 5 Johns. 235. This is still the better practice, or at least, a good practice, if punishment is asked for. Cartwright's case, 114 Mass. 230; Durant v. The Supervisors, 1 Woolworth, 377; U. S. *ex rel* v. A. T. & S. F. R. Co, 16 Fed. Rep. 853. If this was ever the rule of chancery, it has long since ceased to be so, when the sole purpose of the attachment is to enforce a decree or order, such, for instance, as to sign an answer, to make a conveyance, to pay money, etc. All such orders may be waived or condoned by the private person interested in them, and are civil and remedial. *Ex parte* Hooson, L. R. 8 Ch. 231; *Ex parte* Eicke, 1 G. & J. 261; Wall v. Atkinson, 2 Rose 196; Wyllie v. Green, 1 DeG. & J. 410; Buffum's case, 13 N. H. 14; People v. Craft, 7 Paige, 325; Jackson v. Billings, 1 Caines, 252; Anon. 2 P. Wms. 481; Const v. Ebers, 1 Mad. 530; Smith v. Blofield, 2 Ves. & B. 100; Brown v. Andrews, 1 Barb. 227; *Ex parte* Muirhead, 2 Ch. D. 22; Lees v. Newton, L. R. 1 C. P. 658; *re* Rawlins, 12 L. T. N. S. 57. In patent cases it has been usual to embrace in one proceeding the public and the private remedy, to punish the defendant if found worthy of punishment, and, at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff, as is seen by the cases cited in the beginning of this opinion. A course analogous to this has been said, *obiter*, to be proper, by Miller, J., in *Re* Chiles, 22 Wall. 157, 168. "The exercise of this power has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect of the court and its order; and, the second, to compel his performance of some act or duty required of him by the court which he refuses to perform," citing Stimpson v. Putnam, 41 Vt. 238, where a defendant was, at the same time, fined $50 for the benefit of the State, and $1,170 and interest and costs for that of the party injured by breach of an injunction. The chancellor, in that case, said: "This proceeding for contempt is instituted, not only to punish the guilty party, but also, and perhaps chiefly, to cause restitution to the party injured." Such, we repeat, has been the practice in patent causes. It is used in other cases, as in the familiar one of a witness neglecting to answer a summons, who may be fined for his disobedience, and also be required to testify. If the proceedings should be criminal in form, it would make no difference. A criminal sentence, for the benefit of a private person, is to be treated as civil to all intents and purposes. It is beyond the king's pardon, and within the equitable jurisdiction of the court at all times. 4 Bl. Com. 285. At this place, the author, speaking of disobedience to any rule or order of court, of the sort we are considering, says: "Indeed, the attachment for most part of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And, therefore, it hath been held that such contempts and the process thereon, being properly the civil remedy of an individual for a private injury, are not released or affected by the general act of pardon."

Where a defendant had been convicted of an offence against the laws prohibiting lotteries, and had been sentenced to a term of imprisonment which had expired and to pay costs for the use of the prosecutor, and had not paid them, he was discharged from custody under the Lord's Act, which was an early insolvent law, like our poor debtor laws, so far as the discharge of the person is concerned. Rex v. Stokes, Cowp. 136. Aston, J., after saying that an attachment is an execution for a civil debt, and that public offence had been purged by the imprisonment, added: "This stage of the cause, therefore, is merely of a civil nature; and a matter solely between party and party, unconnected with the offence itself;" that it comes within the Insolvent Debtor's Act: "If not, the consequence must be imprisonment for life; for a general pardon would not extend to him," that is, would not release him from costs due a private person, or from imprisonment on account of them, "as was agreed in Rex v. Stokes, 23 Geo. 2." So where a penalty was inflicted by a criminal proceeding, but for the benefit of a private person, and an attachment was issued for want of a sufficient distress, Buller, J., said that the proceeding was like a civil action, and that *Ex parte* Whitchurch, 1 Atk. 54, where attachment for not performing an award was held to be criminal was no longer law. It was held, therefore, that the defendant could not be attached on Sunday. The King v. Myers, 1 T. R. 265. We do not mean to be understood that the court has a general discretion to annul orders passed for the benefit of a party to the suit; but that where inability is shown to comply with the order, as, for instance, insanity, if the decree requires an act to be done, or poverty, if the decree is for the payment of money, it is according to the course of the court and of all courts to discharge the imprisonment, of which the end is proved to be unattainable. See, besides the cases already cited, Wall v. Court of Wardens, 1 Bay, 434; *Re* Sweatman, 1 Cowen, 144; Kane v. Haywood, 66 N.C. 1; Galland v. Galland, 44 Cal. 478; Pinckard v. Pinckard, 23 Ga. 286.

Where an attorney of any court fails to pay over money to his client, the court may, after due proceedings, commit him for a contempt. This was formerly considered to be criminal, and is fully explained in 2 Hawkins P. C. 218, *et seq.* But it has long since been settled that it is of a civil character. *Ex parte* Cullifford, 8 B. & C. 220; Rex v. Edwards, 9 B. & C. 652. The lord chief

justice in the latter case said that it had "always" been held that attachments for non-payment of money were in the nature of civil process. In Regina v. Thornton, 4 Exch. 820, and The Queen v. Hills, 2 E. & B. 175, costs in a criminal case were in question, and the defendant was discharged, in one, because the prosecutor had proved for the amount in bankruptcy, and thus waived the attachment; and in the other, because the defendant had been discharged as an insolvent. In the former of these cases it was said by Pashley, *arguendo*, that the courts had exercised the power to discharge a defendant in such a case, on account of poverty, as early as 29 Edward 1. It was admitted, in argument, in the case before us, that the court would not have been justified in imposing a pecuniary fine upon the defendant if he had proved his property before the order was made; but that afterwards it was too late. We are of opinion that no such distinction can be maintained; but that the defendant should be released from imprisonment in such a case, though his evidence is produced while the order is in process of enforcement against him.

Petition denied.

NOTE.—The opinion is so exhaustive that nothing could be added to enhance its value.—[EDITOR].

MASTER AND SERVANT—NEGLIGENCE—EXPERT TESTIMONY—WEIGHT OF.

THE ATCHISON, ETC. R. CO. v. THUL.

Supreme Court of Kansas, July 3, 1884.

1. Where the evidence showed that the plaintiff, a section hand in the employ of the defendant railroad company, while in the performance of his duties, along with other employes of the railroad company, took a hand-car off the railroad track to permit a train belonging to the defendant to pass, and while standing by the side of the track the employes of the railroad company in charge of the engine permitted water to escape from the engine and to be thrown in the plaintiff's eyes, whereby injury occurred. *Held*, that the evidence proved a cause of action in favor of the plaintiff and against the railroad company.

2. In such a case, where the court appointed competent medical experts to examine the plaintiff's eyes, and they made such examination and testified in substance that no great or material injury could have resulted from the water being thrown in the plaintiff's eyes, and the court instructed the jury, among other things, with regard to "expert testimony," that "in all cases such testimony should be received and weighed with caution," and the jury found a verdict in favor of the plaintiff for $2,000; *Held*, that such instruction of the court was erroneous, and may have misled the jury into finding a verdict for a greater amount of damages than the plaintiff was entitled to.

3. The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and to receive just as much weight and credit as the jury may deem it entitled, when viewed in connection with all the other circumstances, and its weight and value are questions for the jury, and not for the court.

Error from Shawnee County.

A. A. Hurd, W. C. Campbell, and Robert Dunlap, for plaintiff in error; *Case & Curtiss*, for defendant in error.

VALENTINE, J., delivered the opinion of the court.

This was an action brought by John Thul against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for injuries alleged to have been caused through the negligence of the agents and servants of the defendant in operating its railroad. The alleged injuries occurred about December 15, 1881, and were principally to the plaintiff's eyes, and were alleged to have been caused by the defendant's agents and servants throwing hot water or steam into the plaintiff's face and eyes, from an engine belonging to the defendant. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, assessed the plaintiff's damages at $2,000 and also made numerous special findings in the case. The defendant moved for judgment upon the special findings, and also filed a motion to set aside the verdict and findings, and for a new trial; which motions were overruled by the court and judgment rendered in favor of the plaintiff and against the defendant for $2,000 and costs; and to reverse this judgment the defendant now prosecutes a petition in error in this court.

The first point made in this case is that the evidence is not sufficient to sustain any judgment or verdict in favor of the plaintiff and against the defendant, and therefore that the judgment of the court below should be reversed. We think the plaintiff in error, defendant below, is mistaken with regard to this matter, and yet we are inclined to think that there was such error committed in the case to require a reversal of the judgment of the court below. It appears that prior to and on December 15, 1881, the plaintiff Thul, was in the employ of the defendant as a section hand. He was then partially blind from disease of the eyes which he had contracted in the year 1861. On or about December 15, 1881, the plaintiff with other laborers in the employ of the defendant, about twenty-two or twenty-three in number, started on three hand-cars to go from Topeka to their place of work, a few miles east of Topeka; and after passing over the track about one-quarter of a mile, they met one of the defendant's trains on the same track coming from the east. This train consisted of an engine, a tender and a few coal cars. As to which end of the engine was in front, the evidence does not clearly show, but probably the end with the pilot or "cow-catcher" was in front. When the men on the hand-cars saw the train coming, they took the hand-cars off the track, placed them on the north side thereof, and they all stood there until the train passed. They

were far enough away from the track to avoid all danger of being struck by any portion of the train. There were two or three men in the cab of the engine, one of whom was looking out at the time. Whether the other one or two looked out or not at any time is not clearly shown by any direct evidence. Just as the engine passed these men with the hand-cars, a quantity of water, or steam and water, was thrown from the engine, some of which went into the face and eyes of the plaintiff, Thul. Of course, the plaintiff was injured, but whether much or little is a very doubtful question; probably not very much; but whatever the injury may have been, we think he is entitled to recover for it, and it constitutes the basis of this action. We think there was ample evidence to sustain a verdict and judgment in favor of the plaintiff and against the defendant for some amount; and hence the court below did not err in overruling the defendant's demurrer to the evidence, and did not err in overruling the defendant's motion for judgment, and would not have erred in overruling the defendant's motion for a new trial. If no other ground had been interposed to support such motion than that no cause of action was proved in favor of the plaintiff. The principal ground, however, upon which the defendant claims that no verdict or judgment should have been rendered against it is that there was no sufficient evidence introduced to show that the man who looked out of the cab was the engineer, or to show that the engineer saw any of the men on the side of the track, or that he knew that they were near when the water and steam was permitted to escape from the engine; and it claims that presumptively no one but the engineer had any authority to permit steam or water to escape from the engine, and therefore, presumptively that he was the one who did it. The jury, however, found that the engineer did see the men on the side of the track before the water or steam was permitted to escape; and we think the evidence will sustain such a finding. It was undoubtedly the duty of the engineer to look ahead of his engine and on both sides and to know what was in front and near the engine on both sides and in all probability he did see these men on the side of the track and knew that they were there; and there was not a particle of evidence introduced in the case tending to show otherwise. He may have been the very man whom the men on the side of the track saw looking out of the cab when the engine passed.

We think there was ample evidence to show that the plaintiff on his part was free from all fault and negligence; and the jury so found; and we also think that there was ample evidence to show that the defendant on its part and through its employes was guilty of negligence; and this the jury also found: and therefore, we think that the evidence showed that the plaintiff was entitled to recover something. But a still more serious question arises—was not the jury misled by a certain instruction of the court below? Being so misled, did they not award the plaintiff excessive damages? The instruction reads as follows:

"Ninth. There has been some evidence in the case, known as 'expert testimony.' In respect to such testimony I instruct you that its value depends upon the learning and skill of the expert witness and on the nature of the subject of investigation. The value of such testimony varies with the circumstances of each case, and of these circumstances the jury must be the judges; and you must determine whether great or little weight is to be accorded to it. But in all cases such testimony should be received and weighed with caution."

The defendant excepted to this instruction, but really complains of only the last sentence thereof, to wit: "But in all cases such testimony (that of experts) should be received and weighed with caution." Counsel for the defendant ask: "Why should the testimony of experts in all cases be received and weighed with caution? Is there such a probability of a mistake in science that opinions based upon facts are to be received with caution?" We think this question is pertinent in the present case, for the reason that the defendant based its whole defense almost entirely upon the testimony of medical experts; and these medical experts were not ignorant men brought in merely by the defendant itself to testify as partisans in its defense or to prove its case; but they were educated physicians and surgeons of long experience, eminent in their profession, and one of them was not only a physician and surgeon but was also an oculist, who had made diseases of the eye a specialty for several years, and they were all appointed by the court itself to make a professional examination of the plaintiff's eyes, because of their skill and competency in such matters. They made the examination, and testified in the case, stating what they saw and observed, with their opinions and conclusions; and this is a portion of the "expert testimony" which the court below instructed the the jury "should be received and weighed with caution." If the testimony of these witnesses is to be relied on, the plaintiff should not have recovered any very large amount of damages; indeed, he should have recovered but very little more than nominal damages. These witnesses testified that the plaintiff's blindness could not have been caused by water and steam as he claims that it was, but that it was caused by many years of disease of the eyes, by inflammation, granulation, irritation and consequent opacity of the cornea. The plaintiff testified that his eyes and face were burned and scalded by hot water and steam, but the expert witnesses testified that this could not be true, for the reason that there are no evidences of any loss or destruction of tissue; that the effect of burning or scalding is immediate, while it is shown by the evidence in this case that the plaintiff continued to work or try to work as a section hand for two days after the water was

thrown in his eyes; that water if not hot enough to burn or scald, could not produce blindness such as the plaintiff is afflicted with; and that opacity of the cornea, without destruction of the tissues, and such as the plaintiff is afflicted with, cannot be produced from any cause, within a few days, or a few weeks, or a few months, or even within the longest period of time within which the plaintiff claims that he became blind, or nearly blind, after the water was thrown in his face and eyes; but can be produced only by disease for years. As before stated, the plaintiff was partially blind before this water was thrown in his eyes; and he is not totally blind yet, but he cannot see so well now as he could before the water was thrown in his eyes.

This case has been tried before a jury, and this is the second time that it has been to this court. A. T. & S. F. R. Co. v. Thul, 20 Kas. 466. On the first trial, the jury found the plaintiff's damages to be $400, while on the second and last trial, the jury found the plaintiff's damages to be $2,000 as before stated. Evidently the jury paid but very little attention to the "expert testimony" of the physicians and surgeons appointed by the court and who testified in this case; and their reason for so doing may have been the above quoted instruction given to them by the court. We think that such testimony should have been given due and proper weight, and should not have been "received and weighed with caution." In the case of Carter v. Baker, 1 Sawyer, U. S. C. C. 512, the presiding judge laid down the following rule: "The testimony of experts is to be considered like any other testimony; is to be tried by the same tests and receive just as much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances." We think this is probably as good a general law as any that could be adopted. Mr. Lawson, in his work on expert and opinion evidence, page 240, states the rule as follows: "The testimony of experts is entitled to the same credit, is to be tested by the same rules as are applied to the evidence of other witnesses, and should have weight with the jury according to their opportunities and qualifications; but it is not conclusive," and Mr. Rogers in his work on expert testimony, page 65, sec. 42, makes the statement that "it is evident that the value of expert testimony depends on the learning and skill of the expert and on the nature of the subject of investigation. If the subject of inquiry relates to the cause, nature or effect of disease, for instance, the opinions of eminent or learned physicians would be entitled to the very highest consideration." But in another part of the same section, Mr. Rogers uses the very language, with the addition of the word "great" which the court in the present case used in the foregoing instruction, Mr. Rogers says: "But in all cases the testimony of experts is to be received and weighed with great caution." This language just quoted might be proper in some cases; but it certainly cannot be proper in all cases; and it cannot be proper in the present case. We think the language first quoted from Mr. Rogers' work on expert testimony is correct. The opinions of eminent and learned physicians and surgeons and oculists is entitled to great consideration, at least where they have made a personal examination of the subject as in the present case. In the case of Anthony v. Stinson, 4 Kas. 221 this court used the following language:

"It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict; but the jury must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given to it in making up the verdict. The testimony of experts, or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing and governing the judgment of the jury, and must be of such a character as to outweigh by its intrinsic force and probability, all conflicting testimony."

While many courts speak disparagingly of some kinds of expert testimony, that with regard to hand-writing for instance yet we think that all courts hold that the testimony of competent medical experts is entitled to great respect and consideration. Pannell v. Commonwealth, 85 Pa. St. 260; Eggers v. Eggers, 57 Ind. 461; Cuneo v. Bessoni, 63 Ind. 524; Jarrett v. Jarrett, 11 W. Va. 584, 626; Thomas v. The State, 40 Tex. 65; Pitts v. The State, 43 Miss. 472, 480; Templeton v. The People, 10 Sup. Court N. Y. (Hun.) 357; Choice v. The State, 31 Ga. 424, 481; Flynt v. Bodenhamer, 80 N. C. 205; Getchell v. Hill, 21 Minn. 471; Wood v. Barker, 49 Mich. 295, 298; Rogers on expert testimony 268, 269. See also with reference to expert testimony, the authorities heretofore cited and Humphries v. Johnson, 20 Ind. 190; Tinney v. N. J. Steamboat Co. 12 Ab. Pr. N. S. (N. Y.) 1.

There are many cases in which we would think that the language used by the court below in the foregoing instruction would not be materially erroneous; for in many cases expert testimony founded merely upon the opinions of the expert witness would be almost wholly worthless. We have all seen such cases; and in such cases the expert testimony should of course "be received and weighed with caution;" but the weight and value of such testimony are questions for the jury; and it is not for the court to determine or to instruct the jury as to how much or how little weight should be given to such testimony. In the present case, we think the expert testimony of the physicians and surgeons who were in fact appointed by the court, and who made a personal and professional examination of the plaintiff's eyes, is entitled to great consideration, and that the court below erred when it instructed the jury that such testimony should "be received and weighed with caution;" and believing that the foregoing instruction is erroneous, and that it may have misled the jury, the judgment of the

court below will be reversed and cause remanded for a new trial.

All the justices concurring.

PARTNERSHIP—RELEASE BY ONE PARTNER OF PARTNERSHIP DEBT WHEN VOID.

BEATSON v. HARRIS.

Supreme Court of New Hampshire.

A release of a suit or cause of action by one of two plaintiffs, co-partners, made by a fraudulent connivance with the defendant, is void.

Assumpsit, for goods sold. The plaintiffs had been former partners in business, and sold the goods to the defendant, who owed for them when the suit was brought. After the action was entered and before the next term of court, Messer, one of the plaintiffs, indorsed upon the summons served on the defendant, over the partnership signature, made by him, that all claims embodied in the suit were settled, and the action was to be entered "neither party" at the next term of court. The plaintiffs claimed that the release was obtained by fraud, and, upon evidence excepted to by the defendant, the referee found that Beatson furnished all the capital of the firm, which had been dissolved more than two years when the suit was brought. Messer was insolvent and indebted to Beatson, who had an understanding with Messer that he was to collect the accounts of the firm, and thus far he had done so. The defendant went twice to see Messer before he obtained the release. It was obtained without the payment of any money, but "upon a certain agreement then made." The defendant did not see Beatson, because he could not settle with him without paying the claim, and Beatson did not know of nor assent to the release of the action. Both parties move for judgment.

H. Holt, for the plaintiffs; *H. W. Parker*, for the defendant.

ALLEN, J., delivered the opinion of the court.

In personal actions having more than one plaintiff, a release by one of the plaintiffs is a defence (Kimball v. Wilson, 3 N. H. 100, Clark v. Dinsmore, 5 N. H. 140); and a release by one partner of an action in favor of a partnership binds the firm. Pierson v. Hooker, 3 Johns. 68; Bulkley v. Dayton, 14 Johns. 387; People v. Keyser, 28 N. Y. 226, 228; 1 Pars. Cont. 186, 187. But fraud vitiates all contracts, and a release given by the fraud of one partner, or obtained through the fraud of the defendant, or through the fraudulent connivance of one partner with the defendant, could not be upheld against the firm. Morse v. Bellows, 7 N. H. 549, 567; Noyes v. N. H. N. L. & S. R. Co., 30 Conn. 1; McBride v. Hagan, 1 Wend. 326; Gould v. Gould, 36 Barb. 270; Smith v. Stone, 4 G. & J. 310; 1 Pars. Cont. 187.

Fraud has not been found in express terms, but the facts which are found, coupled with omissions, are too significant to admit of any reasonable explanation consistent with good faith on the part of Messer and the defendant. The claim sued for was due. Messer was insolvent, owed Beatson, and knew that this claim with others belonged to him, and that he, Messer, had no authority to collect it. The defendant went repeatedly to Messer before he obtained the release, but did not try to settle with Beatson because he knew he could not without paying the claim. He knew the claim was due, and must have known, or ought to have known, of Beatson's sole authority and Messer's want of authority to collect or adjust the claim. No money was paid on account of the release, and it does not appear that anything else than money was paid, or agreed to be paid, nor what the "certain agreement" was; whether it was of any value as a consideration for the release, and if so, whether or not the partner, Messer, was to receive the benefit of it on his private individual account. The silence of the report on the subject of the agreement is eloquently suggestive, and no other conclusion can be arrived at than that the release was obtained without any legal consideration. Want of authority on the part of Messer to give the release, known to the defendant, and want of a legal consideration for the release, destroyed its force and made it void.

Judgment on the report for the plaintiffs.

NOTE.—It is the general rule that if one of two partners releases to a debtor of the partnership, the firm is bound. Arton v. Booth, 4 Moore, 192 (1820); Furnival v. Weston, 7 Id. 356 (1822); Halsey v. Whitney, 4 Mason, 206, 231 (1826); Pierson v. Hooker, 3 Johns. 68; Ludlow v. Simond, 2 Caines (Ct. Err.) 1 (1805); Bulkley v. Dayton, 14 Johns. (N. Y.) 387 (1817); Ball v. Dunsterville, 4 T. R. 313; Bruen v. Marquand, 17 Johns. (N. Y.) 58 (1819); even though the partners have dissolved; Buchanan v. Curry, 15 Johns. (N. Y.) 137 (1821); Nottidge v. Pritchard, 2 Cl. & F. 379; 8 Bligh, N. S. 493; and have executed an irrevocable power of attorney to a third person, authorizing him to demand and receive the firm's debts; Rapier v. McLeod, 9 Wend. 120 (1832); or even though suit has been brought; Noonan v. Orton, 31 Wis. 265 (1872); Parsons on Partnership, 174, note, citing Barker v. Richardson, 1 Y. & J. 362; Arton v. Booth, 4 J. B. Moore, 192; Furnival v. Weston, 7 Id. 316; Jones v. Herbert, 7 Taunt. 421; Wilson v. Mower, 5 Mass. 411; or though it be reduced to judgment. Romain v. Garth, 3 Hun. (N. Y.) 214 (1874); provided the release was free from fraud; Ibid; Loring v. Brackett, 3 Pick. 403; Winslow v. Newlan, 45 Ill. 145. See all cases previously cited. See Hawkshaw v. Parkins, 2 Swanst. 539 (1819). In Salmon v. Davis, 4 Binney (Pa.), 375 (1812), it is held that such release is binding, even though he had no authority to release more than his moiety of the debt, and evidence showing that at the time of the release the debtor was cognizant of this want of authority, was held properly excluded.

But a covenant not to sue is no release. Walmsley v. Cooper, 3 Per. & Dav. 149; s. c. 11 Ad. & E. 216. And a release after dissolution is void where executed contrary to the arrangement of the partners, the debtor knowing the fact. Gram v. Cadwell, 5 Cow. (N. Y.) 489 (1826); Henderson v. Wild, 2 Camp. 561; Dob v. Halsey, 16 Johns. 34. So, a release by a partner, after his share in the partnership is sold on execution is void. Aspinwall v. London and Northwestern Railway Co., 11 Hare, 325 (1853). And a release from a partner in payment of his private debt is void, especially if the fact appear on the face of the release. Gram v. Cadwell, 5 Cow. (N. Y.) 489; Piercy v. Fynney, L. R. 12 Eq. Cas. 69 (1871); Williams v. Brimhall, 13 Gray 462, 466 (1859); citing Chazourees v. Edwards, 3 Pick. (Mass.) 5; Rogers v. Batchelor, 12 Pet. (U. S.) 221; Dob v. Halsey, 16 Johns. (N. Y.) 34; Evernghim v. Ensworth, 7 Wend. 326; Collyer on Partnership, secs. 494, 498, 500, 501; Story on Partnership, sec. 132; Casey v. Carver, 42 Ill. 226 (1866); Thomas v. Pennrich, 28 Ohio St. 55 (1875); Corwin v. Suydam, 24 Ohio St. 209; Broaddus v. Edwards, 63 N. C. 633 (1869); Viles v. Bangs, 36 Wis. 131. But see Halls v. Coe, 4 McCord, 136; and *a fortiori* is an agreement to give such a release void: Harper v. Wrigley, 48 Ga. 495 (1873); unless the course of the firm is so uniform in permitting such proceedings, and so notorious that individuals dealing with them must be supposed to have had reference to it in their transactions with the firm, Evernghim v. Ensworth, 9 Wend. (N. Y.) 326 (1831). And where a partner agreed to build a house for the partnership, in payment of his private debt, recovery by the assignee of the partnership for the work was allowed. Williams v. Brimhall, 13 Gray. 462 (1859). Of course the release is void if obtained by the fraud of the debtor. Farrar v. Hutchinson, 9 A. & E. 641 (1839).

In case of a fraudulent release, the other partners may sue in equity. Piercy v. Fynney, L. R. 12 Eq. Cas. 69 (1871); Craig v. Hulschizen, 5 Vr. (N. J.) 363, 365, (1871). Indeed it is difficult to see how the action can be maintained at law, for there both must be joined, and the partner fraudulently acting has no standing. Williams v. Brimhall, 13 Gray (Mass.) 462 (1854). Homer v. Wood, 11 Cush. (Mass.) 62; Craig v. Hulchizen, 5 Vr. (N. J.) 363, 365 (1871); Jones v. Yates, 9 B. & C., 532; Wallace v. Kilsall, 7 M. & W. 214 per Parke, B; Greely v. Myeth, 10 N. H. 15. But see Phillips v. Claggett, 11 M. & W. 84 and Barker v. Richardson, 1 Y. & J. 362, in which Vice Chancellor Wood says a release was prevented from being set up; Aspinwall v. L. & N. W. R. Co. 11 Hare, 325, 335 (1853). While a partner has no implied authority to submit the matters of the partnership to arbitration; Adams v. Bankart, 1 C. M. & R. 681 (1835); Buchanan v. Curry, 19 Johns (N. Y.) 137 (1821); McBride v. Hagan, 1 Wend. (N. Y.) 326, (1828). Yet where an award is made pursuant to such a submission and the partner accepts the amount awarded for the partnership, it is bound; Buchanan v. Curry, *supra*. See Strangford v. Green, 2 Mod. 228; Bacon v. Dubany, 1 Salk. 70; and such submission is always binding upon the partner making it; McBride v. Hagan, 1 Wend. (N. Y.) 326 (1828). A partner may make an assignment for the firm, Halsey v. Fairbanks, 4 Mason 206, (1826).

WEEKLY DIGEST OF RECENT CASES.

1. ACTION FOR WRONGFUL DEATH—PARENT AND CHILD.

In an action by a parent to recover for the death of a child past his majority, the right to recovery dedends on a reasonable expectation of benefit by the parent from the child, and in this connection the will and ability of the child to confer benefit on his parent may be shown. *Dallas etc. R. Co. v. Spicker*, S. C. Tex. 18 Rep. 378.

2. ADVERSE POSSESSION.

A party cannot claim that he holds property by adverse possession where he originally entered by a license. *Lund v. Brown*, S. C. Pa. March 24, 1884; 41 Leg. Int. 356.

3. ASSIGNMENT OF CONTRACT— NOVATION—OFFSET—CONSIDERATION — STATUTE OF FRAUDS — PRESUMPTION.

A owed B for work; B assigned the debt to C; C gave notice to A, and A promised to pay it, but it did not appear to whom. *Held*, (1), that there was a complete novation; (2) that A could not offset a note which B had given to a third party, and which was held by A when notified of the assignment, but gave no intimation that he owned it, especially as the note was payable to order, and not endorsed; (3) that there was a valuable consideration for the promise; (4) it was not within the Statute of Frauds, (5) and it is presumed to have been made to C. *Trow v. Braley*, S. C. Vt. Reporter's Advance Sheets.

4. ASSIGNMENT OF DEBT — NOTICE TO DEBTOR WHEN REQUIRED.

An assignment of a claim, without notice to the debtor, is ineffectual as against an attachment by trustee process, or a subsequent assignment to one without knowledge of the first transfer. *Weed v. Boutelle*, S. C. Vt. Reporter's Advance Sheets.

5. CONSTITUTIONAL LAW — CHANGE OF GRADE OF STREET—DAMAGE.

When property is damaged by establishing the grade of a street, or by lowering or raising the grade of a street previously established, it is damaged for public use, within the meaning of the constitution. *McElroy v. Kansas City*, U. S. C. C. W. D. Mo. August 1884; 21 Fed. Rep. 257.

6. CORPORATION—INSOLVENCY—PRIORITY OF PAYMENT—SECURED CREDITORS — EQUITABLE LIEN OF UNSECURED CREDITORS.

The secured creditor of an insolvent railroad corporation, is ordinarily entitled to priority of payment, because, with equal equity, he has a legal lien which equity will recognize and enforce; but when the unsecured creditor has some peculiar and superior equity, the court may establish his debt as an equitable lien upon the property paramount to the secured debt. So where the holders of certain unsecured notes given in liquidation of a debt growing out of the construction of a part of the insolvent's road, and to prevent a lien thereon, intervened after the decree of foreclosure of a mortgage thereof, and prayed to have their debts established as equitable liens upon the property and funds of the insolvent road para-

mount to the lien of the mortgage, *held*, that they were entitled to relief as prayed. *Farmers etc., Co. v. R. Co*: *Lee v. Farmers etc. Co.*, U. S. C. C. S. D. Iowa, 21 Fed. Rep. 264.

7. ELECTIONS— RESIDENCE — POLITICAL RIGHTS—FEDERAL OFFICER.
Residence, being synonymous with domicil, where a citizen and resident of a State accepts Federal employment at Washington, and resides there, but continues to pay his poll-tax and to vote in the State, returning to his home there during the vacation allowed him, his constitutional residence remains unchanged. *State v. Grizzard*, S. C. N. C. 18 Rep. 375.

8. EQUITABLE JURISDICTION AND RELIEF—INSOLVENT PARTNERSHIP—RECEIVER.
An insolvent firm offers by circular-letter to its creditors to pay fifty per cent. of their debts, and agrees to make no preferences. It subsequently continues business at large expense, postpones the execution of this compromise for an indefinite period, until all the creditors accept, and pays many of the debts in full, thereby making preferences. Equity has jurisdiction upon a creditor's bill to appoint a receiver and take possession of the firm assets and administer them for the benefit of the creditors, without previously obtaining judgments at law. *Fink v. Patterson*, U. S. C. C. E. D. Va. July, 1884; 17 Chic. L. N. 9.

9. ESTOPPEL — SEIZURE OF BOAT — ASSERTION OF FAILURE TO EARN. WHEN PLAINTIFF THE CAUSE.
The vendor of a cargo delivered by him on libelant's boat, to be carried by libelant for a third party, appropriated the boat in order to coerce payment from such party of the purchase price of the cargo. The vessel owner having libeled the cargo, *held*, that the vendor, who intervened as claimant, was estopped from claiming that the libellant had not earned freight. *Blowers v. One Wire, etc.*, U. S. C. C. S. D. N. Y. Aug. 1, 1884; 21 Fed. Rep. 352.

10. EVIDENCE—ADMISSION BY AGENT OF NEGLIGENCE—RES GESTAE.
A passenger on an ocean steamer had her wrist injured in going from her stateroom to that of another passenger's; she alleged in her suit against the company that the injury would not have occurred if there had been a hand-rail placed along the saloon. *Held*, that the admission of the captain of the vessel that that was a very dangerous part of the vessel, and that he would have it remedied; should not have been admitted. *Am. S. S. Co. v. Landreth*, S. C. Pa. March 17, 1884; 41 Leg. Int. 368.

11. FRAUD—EXECUTOR—PURCHASE OF MORTGAGED PROPERTY—RESULTING TRUST.
An executor who negotiates a mortgage upon part of his decedent's estate, to provide funds for a child and devisee of such decedent, cannot afterwards purchase the land under foreclosure proceedings and hold it for himself. The quality of his estate therein will be a resulting trust for the benefit of the child for whom the mortgage was made. *Allan v. Gillet*, U. S. C. C. W. D. La.; 21 Fed. Rep. 273.

12. INNKEEPER — NEGLIGENCE — GUEST INTOXICATED AT BAR.
The liability of an innkeeper for a guest's baggage is rather increased than diminished by the fact that the guest became intoxicated at the bar of the inn. *Rubenstein v. Cruikshanks*, S. C. Mich. June, 1884; 18 Rep. 365.

13. INSURANCE—FIRE—WARRANTY—APPLICATION.
Where the answer to an interrogatory in application for a policy of fire insurance is indefinite and ambiguous, notwithstanding which the company issues the policy applied for, it cannot subsequently, in case of a loss under the policy, set up as a defence a breach of warranty on the part of the insured in answering the interrogatory. The company should in such case demand more specific information as to the subject matter of the interrogatory before issuing the policy. *Lebanon Mut. Ins. Co. v. Kepler*, S. C. Pa. Apr. 14, 1884; 15 W. N. C. 97.

14. INTERVENTION—PARTICIPATION IN TRUST FUND—JUDGMENT AT LAW.
It is not necessary to the right of intervention, to participate in a trust fund *in custodia legis* that the intervenor should first obtain judgment at law, or that he should have any lien upon the fund. *Farmers etc. Co. v. R. R. Co.*; *Lee v. Farmers etc. Co.* U. S. C. C. E. D. Iowa, 21 Fed. Rep. 264.

15. JUDGMENT—KEEPING IT ALIVE AFTER SATISFACTION.
A judgment as between the parties may be kept alive, although once paid, for the purpose of securing another loan. *Pierce v. Black*. S. C. Pa. Mar. 10, 1884; 41 Leg. Int. 357.

16. JUROR—CAUSE OF CHALLENGE—BIAS AGAINST OCCUPATION OF PARTY.
In the trial of a suit for violation of the conditions of a liquor dealer's bond, it is not a cause of challenge to a juror that he has a bias in favor of, or a prejudice against, the business or occupation of selling liquors by the retail, and it is not error to refuse to permit the jurors to be questioned as to such bias or prejudice. *Gray v. Ragan*, Tex. Ct. App. June 14, 1884; 4 Tex. L. Rev. 171.

17. JURY—DISQUALIFICATION—INTEREST IN MONEY CHARGED TO BE STOLEN—MARRIAGE.
The mere fact that the wife of one of the grand jurors, who found an indictment against the respondent charged with misapplying and diverting the funds of the St. Albans Trust Company, was a depositor in the said company in her own right did not disqualify him. *State v. Brainerd*, S. C. Vt. Reporter's Advance Sheets.

18. MORTGAGE—ASSIGNMENT—INNOCENT PURCHASER.
The rights of an innocent purchaser of real estate are superior to those of an assignee who fails to have the assignment of the mortgage properly recorded, the mortgagee discharging the mortgage, and there being nothing to put the purchaser on inquiry. *Ladd v. Campbell*, S. C. Vt.; Reporter's Advance Sheets.

19. NEGLIGENCE — CONTRIBUTORY — ADJOINING OWNER—DANGEROUS STRUCTURE.
An adjoining owner is not guilty of contributory negligence because he does not provide extra safeguards for the protection of his premises from a dangerous structure built on the adjoining land. *Alpend v. Churchill*, S. C. Mich. June, 1884; 18 Rep. 366.

20. NEGLIGENCE—DEATH—HUSBAND AND WIFE—SEPARATION.
Where an action is brought by a wife for damages resulting from the death of her husband, and it

appears that at the time of his death she was living apart from her husband, such separation, unless it is shown to have been brought about by such misconduct on her part as would cause her to forfeit her matrimonial rights, is no bar to a recovery. *Dallas etc. R. R. Co. v. Spicker*, S. C. Tex. 18 Rep. 378.

21. PARTNERSHIP— DISSOLUTION— EXTENSION OF TIME TO RETIRING PARTNER—SURETYSHIP.
A creditor, who, after the dissolution of a firm, the remaining partners agreeing to pay the debts of the firm, with full knowledge of such agreement, extends the time of payment of his debt at the request of the remaining partners, discharges the retiring partner, as he is a surety only. *Monroe v. Oneil*, Man. H. Ct. Feb. 4, 1884; 1 Man. L. J. 245.

22. PLEADING—CORPORATE NAME—DEMURRER.
In an action against a railroad company it may be designated as a company by its corporate name, without an allegation of its corporate capacity, and if this be disputed it should be by way of answer and not by demurrer. *Stanley v. Richmond etc. Co.*, S. C. N. C. 18 Rep. 373.

23. PLEDGE—INTEREST IN PROSPECTIVE PARTNERSHIP.
There may be a present pledge of an interest in a future limited partnership which will vest an equitable interest in the pledgee, although the pledger is to remain in possession of the interest until the pledgee shall demand an assignment from him. *Collier's Appeal*, S. C. Pa. 15 Pitts. L. J. 57.

24. PRACTICE AND PROCEDURE—REMITTING PART OF VERDICT — WHEN ALLOWED—RIGHT OF APPEAL.
A trial court, in a meritorious case, will not allow a plaintiff to remit a part of the amount for which a verdict has been rendered, when such reduction will deprive the defendant of an opportunity to have the decision reviewed in an appellate court. *Rogers v. Bowerman*, U. S. C. C. S. D. N. Y. August 23, 1884; 21 Fed. Rep. 284.

25. RES JUDICATA—PROBATE OF WILL IN FOREIGN STATE—IMPEACHMENT FOR INSANITY.
Duly certified copies of the record of a will and of the probate of the same, made in Indiana, are conclusive; and the will cannot be attacked in our courts by proving incapacity and undue influence, although the domicil of the testatrix was in this State, it appearing that she died in Indiana, leaving debts and property there, and that its courts had jurisdiction of the subject-matter. *Ives v. Heirs of Salisbury*, S. C. Vt., Reporter's Advance Sheets.

26. TRADE-NAME—RIGHT OF CORPORATION TO ACQUIRE—INFRINGEMENT BY ANOTHER CORPORATION.
A corporation may acquire a property right to the use of a name other than its original corporate name as a trade-mark, or as incidental to the good-will of a business, as well as an individual; and if it has acquired such a right, it cannot be deprived thereof by the assumption of such name subsequently by another corporation, whether the latter selects its name by the act of corporators who organize under the general laws of the State, or the name is selected for it in a special act by a legislative body. *Goodyear, etc. Co. v. Goodyear, etc. Co.*, U. S. C. C. S. D. N. Y. August 15, 1884; 21 Fed. Rep. 217.

27. TRUST—MISTAKE OF LAW—FRAUD.
A deed of trust will be set aside in equity where the party was advised that a clause of revocation could not be inserted in the deed and where the trust was improvident. *Rick's Appeal*, S. C. Pa. April 14, 1884; 41 Leg. Int. 367.

28. WATERS — ERECTION OF EMBANKMENTS BY RAILROADS.
If by reason of the construction of a railroad bed and ditches, the surface water be diverted from its usual and ordinary course, and, by means of embankments and ditches, is conveyed to any particular place, and thereby overflows land which, before the construction of the road, did not overflow, or if such act contributes essentially to the creation of a nuisance, as by the erection of a dam which renders the water stagnant, or produces its overflow so as to cause it to gather in pools or eddies and become stagnant, or by raising it so as to cause the decay of vegetable matter upon its banks, whereby unwholesome gases are developed, the company is liable, even though natural causes combine with its act to produce the injury. *Fort Worth etc. Co. v. Scott*, Tex. Ct. App. April 16, 1844; 4 Tex. L. Rev. 173.

29. WILL—CONSTRUCTION—CHARGE ON LAND.
A mere direction by a testator that a devisee shall pay a legacy does not thereby create a charge on land. There must be something more, express words or necessary implication from the whole will that such was the intention. *Haworth's Appeal*, S. C. Pa. March 17, 1884; 41 Leg. Int. 368.

QUERIES AND ANSWERS.

QUERIES.

40. A is the owner of a house and lot. B is occupying it as a tenant. B goes to C, a druggist, assures him he is a partial owner of the property, and thereupon gets a lot of paint and paints the house. Has C a lien upon the property? If so, in bringing suit, who should be made defendant? M. J.

41. A dies leaving an estate; B qualifies as executor; B receives $1,000 (among other assets) in money, he invests it in a bond due in 1886. B resigns his trust in 1884, and C succeeds him as administrator; when the bond falls due, C collects the money and reinvests it in another bond, B never made any charge against the estate for fees or commissions. Is C entitled to charge commissions for collecting and reinvesting said $1,000? The law of Georgia is, "As a compensation for his services, the administrator shall have a commission of two and one half per cent on all sums of money received by him on account of the estate (except money loaned by him and repaid to him), and a like commission on all sums paid out by him, either to debts, legacies, or distributees." "No fund shall pay commissions but once." SUBSCRIBER.

QUERIES ANSWERED.

Query 36. [19 Cent. L. J. 177.] Does a cross bill fail which seeks affirmative relief as to the other matters than those brought in suit by the original bill, yet properly connected therewith, when a demurrer to the original bill is sustained? B. E. B.

Answer. The original cause and cross-cause are usually, although not necessarily, heard together; Coleman v. Moore, 3 Litt. 355; 2 Dan. Ch. Pldgs. 1658.

Dismissal of the original bill as a general rule carries with it the cross bill. Thomason v. Neely, 50 Miss. 310. But the cross bill is so far an independent suit as to authorize an appeal from a decree dismissing the same on demurrer for want of equity before final determination of the original bill. Lehmans v. Ford, 47 Ala. 733. The court in a proper case, may dismiss the original bill and proceed with the cross bill as an original for relief. W. Va. etc. v. Vinal, 14 W. Va. 637; Jones v. Thacker, 61 Ga. 329. Complainant's dismissal of his bill after the defendant had filed his cross bill, will not necessarily affect the cross bill. Wickliffe v. Clay, 1 Dana, 285. To a bill, defendant filed a cross bill, setting up facts not stated in the original bill, but relating to its subject matter, and praying affirmative relief. Plaintiffs were served with process, but entered no appearance thereto. Plaintiffs dismissed their bill. Held it did not operate to dismiss the cross-bill. Lowenstein v. Glidewell, 5 Dill. 325. Where the answer is a cross-bill and the bill is dismissed for want of prosecution, the cause may be docketed as to the answer and the matters therein contained tried. Wilson v. Bodley, 2 Litt. 55. To a bill filed by A. the defendant filed an answer and a cross-bill against A and B. B made no defence. Subsequently A's bill was dismissed, but was reinstated before decree was entered against B. Held that B could not complain of the reinstatement of A's bill as A was not discharged as to the cross-bill and that the court was competent to entertain jurisdiction whether the original bill was or was not reinstated. See Reed v. Kemp, 16 Ill. 445; McDougald v. Dougherty, 14 Ga. 674; R. Co. v. Union Mill Co. 109 U. S. 702.

Hamilton, Mo. CROSBY JOHNSON.

Query 37. [19 Cent. L. J. 237.] A obtains judgment against B, and levies upon and sells real estate of C (in which B has no interest) thereby casting cloud on C's title and greatly injuring his credit. Can C recover damages from A? If so, what will be the measure? M.

Answer. The question whether C is in possession or not is very important; if he is, a similar point will be found discussed in Lehman et al., v Roberts, 86 N. Y. 232. SUBSCRIBER.

Le Sueur, Minn.

Query 38. [19 Cent. L. J. 238.] Suppose A goes to the top of his house, for the purpose of removing an upright joist, on which is suspended a clothes-line, A, being in such a position on the roof that he is unable to see the bottom of a private alleyway, which passes by the house of A. A takes the joist from its fastenings and throws it down the private alleyway, (on which there is allowed occasional public travel) and hits B on his head, and B is instantly killed. Is A guilty of murder?

Sandwich, Mass. E. S. W.

Answer No. 1. Some important conditions are not disclosed in the query. Did A know people were passing in the alley and gave no notice, then the homicide was murder. It was manslaughter, if the act were done when it was probable no one was passing, and excusable homicide, if the locality were retired, and no one was in the habit of passing, nor likely to pass Harris Crim. Law. "On which there is allowed occasional public travel." Query, was the act on an occasion when public travel was allowed or not?

LeSueur, Minn. SUBSCRIBER.

Answer No. 2. A certainly had a right to go to the top of his house and remove a joist or anything else which was on it, but that removal must be careful and with due caution. When A allowed the element of carelessness to enter the transaction, then he became a violator of criminal law, for a crime or misdemeanor is: "The violation of a public law in the commission of which there must be a union, or joint operation of act or intention, or criminal negligence." Negligence supplies the place of intent. So when A threw a piece of timber, which was likely to produce death, off of his house into an alleyway, which was sometimes used by the public, although private, without first ascertaining whether anyone was passing, it was the commission of a lawful act, in an unlawful manner, or without necessary discretion and caution. The act itself was authorized by law, but it was performed carelessly. The killing is not murder for there was no malice; but it is manslaughter in the commission of a lawful act without due caution and circumspection. Blackstone IV Book Bishop's Crim. Law. Georgia Code and Supreme Ct. R. JOHNSON.

Gainesville, Ga.

RECENT LEGAL LITERATURE.

TWENTIETH FEDERAL REPORTER. The Federal Reporter, Vol. 20. Cases argued and determined in the Circuit and District courts of the United States, May, August, 1884. Robert Desty. Editor. Saint Paul. West Publishing Co. 1884.

There are no particularly striking cases in this volume, and all of general importance have been noted as the serial numbers of the volume appeared.

DIGEST OF RAILWAY DECISIONS. A digest of Railway Decisions comprising all American cases reported since the publication of the first volume of this digest in which a railway company is a party and all other cases in which railway law is determined. This volume also contains full selections from the English, Scotch, Irish, Canadian and Australian cases, including all cases of value to the American Bar. By John F. Lacy of the Iowa Bar. Vol. II. Chicago. Callaghan & Co. 1884.

Eleven thousand cases are digested in this volume. This digest is a well executed work, showing that Mr. Lacey possesses the highest degree of competency for the work, and being upon a subject of every day importance, the convenience which attends the possession of such a work is manifest. The mechanical execution of the work is excellent.

LEGAL MISCELLANY.

From Pennsylvania the ominous news reaches us that a learned lady has successfully maintained a claim to be admitted to the bar. Armed with an LL.B. diploma she has for two years been going from court to court insisting on her right. But hitherto the judges have turned a deaf ear. The statutes of Pennsylvania, as might be expected, say nothing about the sex of lawyers, and only require that the applicants

for admission should be "of an honest disposition and learned in the law." In construing this the courts have hitherto been unanimous in thinking that the custom of confining the profession to men should prevail. By dint of importunity, however, the lady has at length discovered a judge more open to conviction. In deciding in her favor, that functionary pronounced a somewhat striking doctrine. "If," said he, "there is any longer such a thing as what old-fashioned philosophers and essayists used to call the sphere of woman, it must now be admitted to be a sphere with an infinite and interminable radius: she is now found in all the pursuits of life; and it would be an unwise judicial discretion to try to turn backward the wheel of time by saying at this time of day that woman shall not be permitted to pursue the vocation that suits her taste and for which her studies have qualified her." Unexpected labors evidently await the Bar Committee, should our own fellow-countrywomen endeavor to emulate their Transatlantic sisters.—*Law Times.*

The office of Speaker seems to be falling out of the hands of lawyers. It is no secret that the present law officers of the Crown were unwilling to take the chair, and the new Speaker is not a lawyer, neither were his two predecessors. Lord Eversley was, however, sixty-five years ago called to the bar, and going back from his time to the beginning of the century we have an unbroken line of lawyers in the chair of the House of Commons—Abercromby, who was Judge-Advocate, General Manners-Sutton, Abbott, Mitford, and Addington, of whom Mitford, afterwards Lord Redesdale and Chancellor of Ireland, was one of the ablest lawyers of his day. With but few exceptions, back to the beginning of the Parliament of Great Britain, lawyers occupied the chair, and earlier still the same rule prevailed. Of Lord Chancellors Sir Thomas More and Sir Heneage Finch were Speakers; of Chief Justices, Coke, Popham, and Dyer; and of Chief Barons, Turnour and Widdrington. Powle, Trevor, and Harbottle Grimston were Master of the Rolls, and as the Master of the Rolls could sit in Parliament he might be both Speaker and judge. Several law officers of the Crown became Speakers, including Fletcher Norton and Robert Sawyer. At the present time, when the Speaker has his own counsel, and the clerk of the House of House of Commons is a lawyer, there is the less necessity that he should be a lawyer himself: but a succession of three lay Speakers seems to show either that lawyers care less for politics or that politics care less for lawyers.—*Law Journal.*

The following is the tribute paid to the West by Hon. Courtland Parker, President of the American Bar Association, in his annual address: I could almost wish that this had been the session year in the States of the great West, the West of to-day, not simply that of half a century ago, that we might have seen on their statute books the indications such books always give of the character of the people, their sentiments, their progress and their future. For the West, the great States beyond the great river and stretching over the Rocky Mountains to the Pacific ocean, States which half a century ago were scarce more than a wilderness populated by the savage and wild animals upon whose capture they were supported, is the type and picture after all of what this country is to be. Grand in its extent, its rivers, its lakes, and its mountains; grand in its enterprises, which dwarf all precedent audacity; grand in its fertility and its agricultural productions; grand in its wealth, whether dug from the bowels of the earth, or expelled by the blasting of its rocks, or gathered from its numerous flocks and herds, or from the wonderful cultivation of its wonderful farms; it gives promise of a future in which humanity may obtain greater and more admirable development than elsewhere on the habitable globe. Eastern, middle and south, yea, the States, once western, now central, lying east of the Mississippi, are belittled by the strides of the West beyond the river. It is the land for the fairest and speediest trial, and for the most unprejudiced settlement of all vexed questions, social or political. No Puritanism anchors it to strict and defined views. No Quakerism as in the land of Penn, or inheritance of Holland blood as in New York, or commingling of these and other conservative elements as in New Jersey, or long habituation to the system of slave labor as in the States below Mason and Dixon's line, embarrass or in any wise give tone or color to their ideas. They are more cosmopolitan than any region under the sun. Their people is made up almost of every Nation under Heaven. Their laws and their social life ought to be the best, for they have all the past and all the present, for their teachers. If they are so wise as to rise above mere acquisition as the motive of social life; to enforce universal education; to encourage in their midst institutions for the spread of learning and science, to adopt and cherish the freedom which comes of the open Bible, which is founded on true religion, which recognizes the Most High as the Monarch of all nations, and obedience to the law as obedience to Him; if, in short, they build on the foundation of education and religion, the civilization of the great West will be the crowning triumph of mankind; and in the States which constitute it, will be verified and fulfilled the prophecy so familiar to us all:

> "Westward the star of empire takes its way;
> The four first acts already passed,
> The fifth shall end the drama with the day,
> Time's noblest offspring is the last."

NOTES.

——The Chief Justice: "Mr. Williams, we think you ought to accredit this court with some knowledge of the law, and not occupy so much time in discussing elementary propositions." Mr. Williams: "May it please your Honors, I did so accredit the court below, and did avoid, therefore, the discussion of elementary principles, and for that reason I have been obliged to take this appeal."

——Many years ago, Pat Finnegan was arrested for drunkenness and disorderly conduct. The judge fined him $10. Out came Pat's wallet, the fine was promptly paid, and his Honor called the next case. But Pat still stood before the bench—he hadn't got through if the court had. "You can go, what are you waiting for?" asked his Honor. "Me receipt for the tin dollars, sor," said Pat. "Oh, you don't need any receipt," replied the Judge, laughing. "We won't call on you to pay again, unless you repeat the offense." "Sure, it's not that, yer Honor," said Pat. "Oi know the court is 'onest, and all that; but yer see, I might die, yer Honor, and whin I got up to the shinin' gate, St. Pether, heaven rest him, would say to me. 'Did yer pay all yer debts before comin' here Pat?' 'Yis, sor,' I'd say; and thin him ag'in, 'Have ye the receipts with ye, Pat?' and thin, sure, yer Honor wouldn't be after havin' me to hunt all through h—l to find yer Honor, to git the receipt."